SUN MEDIA CORPORATION SDN BHD v. THE NIELSEN COMPANY (MALAYSIA) SDN BHD

COURT OF APPEAL, PUTRAJAYA
BADARIAH SAHAMID JCA
ZABARIAH MOHD YUSOF JCA
NOR BEE ARIFFIN JCA
[CIVIL APPEAL NO: W-02(NCVC)(W)-909-05-2017]
26 JUNE 2020

TORT: *Negligence – Duty of care – Defendant company's survey on consumption of print and electronic media under-represented readership numbers of plaintiff's newspaper – Plaintiff sued defendant for negligence, defamation and malicious falsehood – Whether there was contractual relationship between plaintiff and defendant – Whether defendant owed a duty of care to plaintiff – Whether loss to plaintiff a reasonably foreseeable consequence of defendant's action – Whether relationship between parties one of sufficient proximity – Whether plaintiff's cause of action sustainable*

TORT: *Defamation – Libel – Defendant company's survey on consumption of print and electronic media under-represented readership numbers of plaintiff's newspaper – Whether figures in survey data capable of having defamatory meaning – Whether data primarily statistical and not premised on words – Whether there was evidence of malice – Whether action in defamation and malicious falsehood proven*

The plaintiff was the publisher of a national newspaper called 'the Sun' while the defendant, the Nielsen Company (Malaysia) Sdn Bhd ('Nielsen'), was known for its annual syndicated survey called the Nielsen Media Index or 'NMI.' The NMI survey was a wide ranging survey that sought to measure the consumption of different print and electronic media, viewership of satellite TV channels, as well as readership of, amongst others, newspapers. The dispute between the plaintiff and the defendant centred on the NMI surveys for the years 2006 to 2010. The plaintiff asserted that the NMI surveys had, in this period, under-represented the readership numbers of theSun *ie* that the NMI survey had inaccurately portrayed theSun as being read by a lesser amount of people than was actually the case. The plaintiff contended that this under-representation of readership was the result of flaws in the design, methodology and conduct of the NMI survey by the defendant. Despite the plaintiff's dissatisfaction with the results of the defendant's NMI survey and methodology, the plaintiff decided to commission the defendant in 2007 to conduct a syndicated survey, called the Prime Media Index Survey ('Prime Survey') to gauge, amongst others, the readership of affluent Malaysians to theSun in the Klang Valley from the defendant's existing

database of online respondents. According to the plaintiff, the results of the Prime Survey 2008 commissioned by the plaintiff which found the perceived readership figure of 2.9, demonstrated that the NMI survey results which under-represented the readership of theSun, especially amongst the affluent, was flawed and, in under projecting theSun's readership, had caused the plaintiff to lose advertising revenue. The plaintiff then launched this suit against the defendant in 2011 for three causes of action: negligence, defamation and malicious falsehood arising from the NMI survey for the years 2006 to 2010. In response to the results of the NMI survey, the plaintiff had published two articles ('offending articles') in theSun newspaper in which the plaintiff took issue with the accuracy of the NMI survey results. In response, the defendant published a letter ('offending letter') to its subscribers and customers which sought to address the issues raised by the offending articles and to allay the fears that its subscribers may have with respect to the reliability of its data and findings in their NMI survey. The plaintiff prayed, *inter alia,* for damages to be assessed for the NMI survey as well as special damages for loss of profit from advertisements. There were also prayers for a declaration that the readership data published in the NMI survey report from 2006 to 2010 in respect of theSun newspaper was false, inaccurate and misleading as well as related injunctive reliefs. The High Court Judge ('HCJ') dismissed the plaintiff's claim on all the causes of action. Hence, this appeal. The issues that arose were (i) whether the defendant owed the plaintiff a duty of care; and (ii) whether the publication of the NMI survey data which was inaccurate in portraying an under-representation of readership of theSun, was defamatory of the plaintiff.

Held (dismissing appeal with costs)
Per Badariah Sahamid JCA delivering the judgment of the court:

(1) Readership of newspapers and magazines (the bone of contention between the plaintiff and the defendant) was only one part of the entire survey of the consumption habits of Malaysian adult citizens in Peninsula Malaysia. The plaintiff was only one of many print medias which was the subject of the defendant's survey. There were 22 other newspapers surveyed. The NMI survey was a syndicated survey wherein the results of the survey were published on a biannual basis and only made available to paid subscribers with contractual qualifications on the data, restriction on unauthorised use and disclaimer of liabilities. Non-subscribers did not have access to the results of the NMI survey and any access to such information must be by means of unauthorised sharing or disclosure of the NMI survey results. The plaintiff had ceased to be a subscriber around the year 2000. The period the NMI survey that was the subject of the plaintiff's claim was for the years 2006 to 2010. It was clear that there was no contractual relationship between the plaintiff and the defendant. (paras 42, 49 & 50)

(2) The results of the NMI survey was contractually intended only for the defendant's paid subscribers with contractual limitations and restrictions to its disclosure. The plaintiff, not being a subscriber, had obtained unauthorised access to the results of the NMI survey in respect of the low readership of theSun. Since the plaintiff's access to such information was unauthorised, would the plaintiff be one of those who were within the contemplation of the defendant so as to be within a relationship of proximity to the defendant? This court did not think so. To hold otherwise would open the floodgates to the imposition of a duty of care to an indeterminate number of unauthorised users. The defendant had not assumed responsibility towards the plaintiff in the publication of its NMI survey to its subscribers. Thus, the defendant did not owe a duty of care to the plaintiff that could give rise to a tortious liability. Thus, in the absence of a legal duty owed by the defendant to the plaintiff, issues in respect of the breach of such a duty of care *ie* the alleged inaccuracy of the NMI data and unreliability of its methodology and execution were not relevant. Neither were the issues of alleged economic loss to the plaintiff in its advertising revenue a relevant consideration, as both breach of a duty and consequential damage must be predicated on the finding of a duty of care. (paras 51, 53 & 55)

(3) The plaintiff had also failed to satisfy the 'threefold tests' set out in the case of *Her Majesty's Commissioners of Custom and Excise v. Barclays Bank* in that the loss to the plaintiff was not a reasonably foreseeable consequence of the defendant's action or omission; the relationship between the parties was not one of sufficient proximity and in addition, in all the circumstances of the case it was not fair, just and reasonable to impose a duty of care on the defendant towards the plaintiff. Thus, the plaintiff's cause of action against the defendant on the tort of negligence was unsustainable in law and the findings and decision of the HCJ on this issue was affirmed. (paras 57 & 58)

(4) On the evidence adduced, an action in defamation and malicious falsehood was not proven. The data in the NMI survey, which was primarily statistical and not premised on words, was not found to have a defamatory meaning in itself or by innuendo. There was also no evidence of malice of Sun Media to sustain an action in malicious falsehood. There was no reason to depart from the HCJ's findings or application of relevant law in the above matters. (para 59)

Case(s) referred to:

Her Majesty's Commissioners of Custom and Excise v. Barclays Bank [2006] 4 All ER 256 ***(refd)***

Spring v. Guardian Assurance [1995] 2 AC 296 ***(dist)***

The Co-operative Central Bank Ltd v. KGV & Associates Sdn Bhd [2008] 2 CLJ 545 FC ***(refd)***

Ultramares Corporation v. Touche 174 NE 441 ***(refd)***

White v. Jones [1995] 2 AC 2007 ***(dist)***

For the appellant - Gopal Sri Ram, Malik Imtiaz Sarwar, Clinton Tan Kian Seng, Emily Wong, Yasmeen Soh, Lim Yvonne; M/s Thomas Philip
For the respondent - Robert Lazar, Yee Mei Ken, Loo Ying Ning & Tan Hui Yi (Caitlin); M/s Shearn Delamore & Co

[Editor's note: For the High Court judgment, please see Sun Media Corporation Sdn Bhd v. The Nielsen Company (Malaysia) Sdn Bhd [2017] 1 LNS 1655 (affirmed).]

Reported by Suhainah Wahiduddin

JUDGMENT

Badariah Sahamid JCA:

Introduction

[1] This is an appeal against the decision of the learned trial judge at Kuala Lumpur dated 27 February 2017 which dismissed both the plaintiff's claim and the defendant's counterclaim. By consent of parties, the trial at the High Court was bifurcated in that it was confined to findings of liability only in respect of the claim and counterclaim.

[2] In this appeal before us, the plaintiff, Sun Media appeals against the decision of the High Court which dismissed its claim. The defendant, Nielsen, did not appeal or cross-appeal against the dismissal of its counterclaim by the High Court. Thus, we will confine ourselves to the appeal of the plaintiff only.

[3] For ease of reference, parties will be referred to as they were in proceedings before the High Court.

Background Facts

[4] A summary of the background facts is derived from the learned trial judge's judgment with suitable modifications.

[5] The plaintiff, Sun Media Corporation Sdn Bhd ("Sun Media") is the publisher of a national newspaper called "theSun". It started out as a paid newspaper but in 2002, it was circulated without charge. Its circulation is mainly in the Kuala Lumpur/ Petaling Jaya area as well as in other big cities in Peninsular Malaysia like Georgetown and Johor Bahru.

[6] The defendant, the Nielsen Company (Malaysia) Sdn Bhd ("Nielsen") is part of a global group of companies operating under the "Nielsen" brand. The Nielsen group represents themselves as being a global leader in media, consumer and market research.

[7] Among the media players and stakeholders, Nielsen is known for its annual syndicated survey called the Nielsen Media Index or "NMI". The NMI survey is a wide ranging survey that seeks to measure the consumption of different print and electronic media, viewership of satellite TV channels, as well as readership of amongst others, newspapers. The NMI survey since 1968, is conducted quarterly with the results published on a biannual basis and available only to paid subscribers, with qualifications on the results available, restrictions on usage and disclaimer of liabilities.

[8] The dispute between the plaintiff and the defendant ("the parties") centres on the NMI surveys for the years 2006 to 2010. The plaintiff asserts that the NMI surveys had, in this period, under-represented the readership numbers of theSun ie, that the NMI survey had inaccurately portrayed theSun as being read by a lesser amount of people than was actually the case. For instance, for the year 2008, theSun was portrayed as having a readership of less than 1, ie, 0.8. The plaintiff contends that this under-representation of readership was the result of flaws in the design, methodology and conduct of the NMI survey by the defendant.

[9] There were meetings held between the parties to address some of the concerns of the plaintiff. Despite the plaintiff's dissatisfaction with the results of the defendant's NMI survey and methodology, the plaintiff decided to commission the defendant in 2007 to conduct a syndicated survey, called the Prime Media Index Survey ('Prime Survey') to gauge, amongst others, the readership of affluent Malaysians to theSun in the Klang Valley from the defendant's existing database of online respondents. The results of the Prime Survey was intended to be used by the plaintiff as a marketing tool.

[10] According to the plaintiff, the results of the Prime Survey 2008 commissioned by the plaintiff which found the perceived readership figure of 2.9, demonstrated that the NMI survey results which under-represented the readership of theSun, especially amongst the affluent, was flawed and in under projecting theSun's readership had caused the plaintiff to lose advertising revenue.

The Plaintiff's Claim

[11] The plaintiff launched this suit against the defendant in 2011 for three causes of action: negligence, defamation and malicious falsehood arising from the NMI survey for the years 2006 to 2010.

[12] The plaintiff asserts that the failure of the defendant to accept flaws in the design and methodology of its NMI survey which had yielded an under-represented readership of its publication, theSun, had resulted in the loss of its advertising revenue and consequential loss of profits.

[13] In response to the results of the NMI survey, the plaintiff had published two articles dated 2 March 2011 and 3 March 2011 ("offending articles") in theSun newspaper in which the plaintiff took issue with the accuracy of the NMI survey results. In response, the defendant published a letter dated 8 March 2011 ("offending letter") to its subscribers and customers which sought to address the issues raised by the offending articles and to allay the fears that its subscribers may have with respect to the reliability of its data and findings in their NMI survey.

[14] The plaintiff prayed *inter alia*, for general damages to be assessed for the offending publication (the NMI survey) as well as special damages of RM303.52 million for loss of profit from advertisements. There were also prayers for a declaration that the readership data published in the NMI survey report from 2006 to 2010 in respect of theSun newspaper is false, inaccurate and misleading as well as related injunctive reliefs.

Submissions Of The Plaintiff

[15] The submissions of the plaintiff in respect of its claims may be summarised as follows:

> **Negligence**
>
> The defendant, by virtue of being in possession of special knowledge regarding the plaintiff and the plaintiff's publication, theSun, owes a duty of care to the plaintiff in relation to the preparation of data for the NMI survey which was relied on by third parties. This special relationship gives rise to a duty of care when it can be inferred from the facts and circumstances of the instant case that there is an assumption of responsibility by the defendant in respect of the plaintiff.

[16] The defendant had breached its duty of care to the plaintiff because of the flaws and deficiencies in the conduct and methodology of the NMI survey for the years 2006 to 2010. The findings of the NMI survey was relied on by third parties, in particular advertisers. As a consequence of the inaccuracies in the NMI survey which had under-represented the readership of theSun, the defendant had suffered loss of advertising revenue. Thus, the defendant is liable to the plaintiff for the losses suffered.

Defamation And Malicious Falsehood

[17] The plaintiff's contention is that the publication of the NMI survey data which was inaccurate in portraying an under-representation of readership of theSun, was defamatory of the plaintiff. Although the defendant had given notice to the plaintiff of the falsity of the data on readership, nevertheless the defendant continued to publish the false data thus the defendant would be liable for malicious falsehood.

A **The Defendant's Reply**

[18] The defence of the defendant may be summarised as follows:

Negligence

In respect of the plaintiff's claim in negligence, the defendant asserts that
B the defendant does not owe the plaintiff a duty of care for the following reasons:

(i) The plaintiff is not a subscriber to the NMI surveys 2006-2010, thus there is no contractual relationship between the plaintiff and defendant to premise a duty of care between the plaintiff and the
C defendant.

(ii) There is no proximity of relationship between the plaintiff and the defendant that can give rise to a duty of care between the plaintiff and the defendant.

(iii) From the facts and circumstances, the inference cannot be made
D that the defendant had assumed responsibility to the plaintiff in respect of the publication of the NMI survey results, in particular on the low readership of theSun.

[19] On the assumption there was a duty of care (which is denied), there is no breach of such duty and no damage caused by said breach to warrant
E damages for the following reasons:

(i) The conduct and methodology of the NMI survey was reliable as the methods employed met the acceptable standards of statistical research.

(ii) There is no evidence that the publication of the results of the NMI
F survey had resulted in a loss of advertising revenue to the plaintiff. On the contrary, the evidence adduced showed that during the relevant years 2006 to 2010, the advertising revenue of the plaintiff had increased.

Defamation And Falsehood

G **[20]** In respect of the plaintiff's claim in defamation and malicious falsehood, the defence may be summarised as follows:

(i) The NMI survey does not disparage theSun as a newspaper or lower its reputation. The data published in the NMI survey is not capable of a
H defamatory meaning.

(ii) The words used in the offending letter is not defamatory as it merely seeks to respond to the issues raised by theSun in the offending articles.

(iii) There is no malice proven as the plaintiff had utilised favourable data from the NMI survey in their marketing presentation in 2007 to 2008.
I

Findings And Decision Of The High Court

[21] After 16 days of trial where a total of 13 witnesses, which included the evidence of two expert witnesses who gave evidence on the conduct and methodology employed in the NMI surveys, the learned trial judge dismissed with costs the plaintiff's claim on all causes of action: negligence, defamation and malicious falsehood and dismissed the defendant's counterclaim against the plaintiff on defamation.

[22] The findings and decision of the learned trial judge may be summarised as follows.

Negligence

Duty Of Care

[23] There was no duty of care owed by the defendant to the plaintiff in the publication of its NMI survey for the following reasons:

(i) The plaintiff was not a subscriber of the NMI survey during the period in question ie, 2006 to 2010. Thus, there is no contractual relationship between the parties where a duty of care may arise.

(ii) Even in respect of its subscribers, the defendant had expressly limited their liability to subscribers under cls. 3.1 to 3.3 of the NMI agreement. In addition, the defendant has specifically restricted its subscribers from publication or unauthorised use of the data in the NMI surveys under cls. 1.3 to 1.6 of the NMI agreement.

(iii) To extend the duty of care to the plaintiff, would create an incongruent and anomalous situation where a non-subscriber (the plaintiff) would have better rights in tort as compared to a subscriber whose cause of action is contractual.

(iv) There is no proximity of relationship between the plaintiff and the defendant in respect of the NMI survey, such as to give rise to the contention that by its conduct and the circumstances of the case, the plaintiff had assumed responsibility to the plaintiff.

(v) To impose liability where there is no personal injury, no contractual relationship or other relationship of proximity would stifle research and lead to an open-ended imposition of liability (para 49 of the trial judge's judgment):

> To impose liability would not only stifle research *via* the statistical method but would also expose a person like the Defendant "to a liability in an indeterminate amount for an indeterminate time to an indeterminate class", to borrow the enduring words from the pen of Cardozo C.J. of the United States Supreme Court in *Ultramares Corporation v. Touche*, 174 N.E. 441,444.

A Breach Of Duty Of Care

[24] Even on the assumption that there is a duty of care owed by the defendant to the plaintiff, there is no evidence of any breach of that duty of care for the following reasons:

B (i) The methodology employed in the conduct and execution of the NMI survey meets the acceptable standards of statistical research and the findings are reliable. The trial judge had accepted the expert evidence of Mr Jephcott in coming to his findings.

(ii) All survey methodologies suffer from inherent weaknesses and
C limitations, and subscribers have been duly informed through the NMI agreement, NMI brochure and IMS client training materials. The plaintiff was a subscriber to the NMI survey for six consecutive years from 1995 to 2000 and was aware of the terms of the NMI agreement and the limitations and disclaimers on the usage of the data.

D (iii) The plaintiff had extracted favourable data from the NMI survey and used them in their marketing in 2007 to 2008. This attests to the credibility of the NMI survey.

iv) There are clear material differences between the Prime Survey commissioned by the plaintiff which yielded favourable readership
E findings for theSun, and the NMI survey, which was alleged to under-represent readership of theSun. The two are not comparable. NMI is a syndicated survey nationwide whereas the Prime Survey focused on the KL/PJ area. There are also differences in the population profile, size and projection.

F Damage

[25] The learned trial judge found that even assuming there was a breach of a duty owed by the defendant to the plaintiff, the damage is too remote and further, there is no evidence of damage:

G (i) There was no evidence led to demonstrate that the plaintiff's advertising revenue had been adversely affected by the readership data of theSun in the NMI survey.

(ii) There are many factors such as circulation, advertising rates and
H charges, marketing strategy, client's preferences as well as other variables that determine the decisions of advertising agencies as to where to advertise. It would not be reasonable to conclude that an under-representation of readership is the only factor considered by advertising agencies.

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Defamation And Malicious Falsehood

[26] The learned trial judge found there was no defamation for the following reasons:

(i) The NMI survey data and its extraction and cross-tabulation are only available to subscribers who have contractually agreed to the terms of access, use and the non-sharing of the data. There is no evidence which subscribers of the NMI or third party has knowledge of or have read the NMI data complained of and understood them to be defamatory of the plaintiff. At para. 176 of the learned trial judge's judgment, it was stated as follows:

> I would agree with Nielsen that the NMI Data complained of does not disparage theSun as a newspaper or lower its reputation and a reading of the data does not suggest the defamatory meanings as alleged by Sun Media. It is my finding as set out below that the words which are purely figures here are not capable of conveying a defamatory meaning.

(ii) The plaintiff has also pleaded innuendo. However none of the particulars of innuendo pleaded by the plaintiff has been proved in court.

And further at paras. 182 and 188:

> I would say that the results generated consisting purely of figures are in the context of this case not defamatory of Sun Media or that any innuendo might be arrived at that is of a defamatory nature.
>
> … I agree with Nielsen that without any evidence from Sun Media to prove that the subscribers or any third party has knowledge of any extrinsic facts pleaded by Sun Media in para. 13A of the ASOC, there can be no innuendo meanings ascribed to the NMI Data complained of.

Defence Of Qualified Privilege

[27] Assuming that the words in the NMI survey are defamatory, the defence of qualified privilege would apply in this case.

[28] In order to defeat the defence of qualified privilege, the plaintiff must establish malice on the part of the defendant. The plaintiff has failed to discharge the burden of proving malice on the part of the defendant.

Our Judgment

[29] We have carefully considered learned counsels' oral and written submissions, the appeal records and relevant authorities. We note that the learned trial judge in his 111-page written judgment had extensively and we may add, conscientiously dealt with the issues raised, carefully considered all the evidence before him before arriving at his decision to dismiss the plaintiff's claim and the defendant's counterclaim with costs.

[30] We find no appealable error in the learned trial judge's findings or application of law to warrant appellate intervention. We therefore affirm the decision of the learned trial judge and dismiss the plaintiff's/appellant's claim before us with costs. Our reasons for doing so are stated below.

[31] In view of our decision to affirm the findings and decision of the learned trial judge, suffice for us to highlight the primary issues raised in this appeal, as well as our findings and determination, which also furnish the reasons for our judgment.

Negligence

Duty Of Care

[32] The pivotal issue in the High Court as well as in this appeal before us is the fundamental issue of whether on the particular facts and circumstances of this case, the defendant owed the plaintiff a duty of care.

[33] The dispute between the parties centres on the NMI survey for the years 2006 to 2010. The plaintiff asserts that the NMI survey had in this period, portrayed theSun as having a readership of 0.8 which the plaintiff asserts is an inaccurate and under-representation of the actual readership numbers of theSun. This under-representation of theSun's readership figures was attributed to flaws in the design, conduct and methodology of the NMI survey. It was further contended by the plaintiff that as a consequence of the findings of the low readership figures of theSun above stated, the plaintiff had suffered economic loss in the form of loss of advertising revenue.

[34] One of the issues raised before the High Court and before us is whether the particular facts and circumstances of this case present a novel situation where the court is asked to extend a category of negligence to include the publication of findings and data in surveys. Thus, the court is asked to extend the categories of negligence in what are uncharted waters. To put it briefly, the argument is that the defendant, in the conduct of its surveys of the trends of Malaysian lifestyle owes a duty to present accurate statistics and data of the readership of theStar to third parties, irrespective of a contractual relationship between the defendant and the third party. The alleged breach of the duty by the defendant had resulted in economic loss to the plaintiff in terms of diminished advertising revenue.

[35] The learned trial judge had addressed this matter in paras. 23 and 24 of his Lordship's judgment and cautioned against extending a duty of care in the circumstances of the case as follows:

> Ultimately it is for the Court to decide on whether or not there is a duty of care as in a tortious duty in a given factual matrix that does not quite fit into the traditional pigeon holes of personal injuries, professional relationships, and contractual relationship where the act complained of is in the nature of statements made and the loss is purely economic loss.

> From decided cases in our Courts, the position is that the Court should be slow in extending the categories of duty of care in cases involving pure economic loss and statements or advice given when or where there is no privity of contract or proximity of relationship between the parties.

[36] We are entirely in agreement with His Lordship that the extension of a duty of care to the plaintiff in the particular circumstances of the case is unwarranted.

Assumption Of Responsibility

[37] The plaintiff's arguments to support the defendant's assumption of responsibility towards the plaintiff are as follows: the defendant, by holding itself out as a credible agency for marketing information, was assuming responsibility for the statements made in the form of statistical data in their NMI surveys. This was completely overlooked by the learned trial judge. The defendant's purpose in undertaking the NMI survey was for a commercial purpose. The defendant had chosen to include as subject matter in its NMI survey, the readership figures of several print medias, which included theSun newspaper. Thus, the defendant had created a nexus with the plaintiff in that it was foreseeable that the NMI survey data of the low readership of theSun would have adverse financial consequences for the plaintiff as this would impact theSun's advertising revenue. Thus, according to the plaintiff, the element of proximity is satisfied by the assumption of responsibility.

[38] The fact that the plaintiff was not a subscriber of the NMI survey at the material time and the absence of a contractual relationship between the plaintiff and the defendant was not a material factor as the facts disclosed a relationship of proximity which gives rise to an assumption of responsibility by the defendant towards the plaintiff.

[39] In support of the above-mentioned contention, the plaintiffs made reference to the following authorities. In the case of *White v. Jones* [1995] 2 AC 2007, one of the issues before the House of Lords was whether solicitors who had prepared a will owed a duty of care to the beneficiaries of the will. The House of Lords decided that, notwithstanding the lack of a contractual relationship or a relationship of reliance, a duty of care was owed by the solicitors to the beneficiaries of the will, because of the special relationship between the solicitor and the intended beneficiary of the will. Similarly, in *Spring v. Guardian Assurance* [1995] 2 AC 296, the House of Lords held that an employer owed its ex-employee a duty of care to not provide a negligent reference to a third party by virtue of the employer's possession of special knowledge in respect of the character, skill and diligence of the ex-employee.

[40] The plaintiff's argument is that the defendant, by virtue of holding itself out as a credible agency in possession of special skills and knowledge on market information, similarly owes a duty of care to the plaintiff in relation to the preparation of the NMI survey which was relied on by third parties.

[41] We have considered the authorities above and after perusal, we are of the view that the facts in the two House of Lords cases cited above can be easily distinguished from the facts of the instant case. While it is true that just like in the instant case, there is an absence of a contractual relationship between the parties, nevertheless, the facts in both the cases cited above demonstrate a relationship of proximity that gave rise to an assumption of responsibility akin to a duty of care. In the case of *White v. Jones* (*supra*), the House of Lords held that the assumption of responsibility by a solicitor to his client, who had given instructions for the drawing up of a will for execution, extended to an intended beneficiary under the proposed will in circumstances where the solicitor could reasonably foresee that a consequence of his negligence might result in the loss of the intended legacy without either the testator or his estate having a remedy against him. Similarly in *Spring v. Guardian Assurance* (*supra*), the House of Lords held that an employer who gave a reference in respect of a former employee owed that employee a duty to take reasonable care in its preparation and would be liable to the former employee if he failed to do so and the former employee suffered economic loss in consequence.

[42] The facts of the instant case are far removed from the above two cases cited in terms of proximity and foreseeability. The plaintiff is only one of many print medias which is the subject of the defendant's survey. There were 22 other newspapers surveyed. The survey data were intended for subscribers only and contractual subscribers are not authorised to share the data with other non-subscribers like the plaintiff. Thus, it cannot be said that a relationship of proximity exists between the plaintiff and the defendant.

[43] The appellant placed much reliance on guidelines referred to by Lord Bingham where one party can be said to have assumed responsibility for what is said or done to another. In *Her Majesty's Commissioners of Custom and Excise v. Barclays Bank* [2006] 4 All ER 256, at p. 260. Lord Bingham had stated as follows:

> The parties were agreed that the authorities disclose three tests which have been used in deciding whether a defendant sued as causing pure economic loss to a claimant owed him a duty of care in tort. The first is whether the defendant assumed responsibility for what he said and did *vis-à-vis* the claimant, or is to be treated by law as having done so. The second is commonly known as the threefold test: whether loss to the

> claimant was a reasonably foreseeable consequence of what the defendant did or failed to do; whether the relationship between the parties was one of sufficient proximity; and whether in all the circumstances it is fair, just and reasonable to impose a duty of care on the defendant towards the claimant.

[44] The plaintiff referred to the Federal Court decision in the case of *The Co-operative Central Bank Ltd v. KGV & Associates Sdn Bhd* [2008] 2 CLJ 545; [2008] 2 MLJ 233, where Justice Alauddin Mohd Sheriff CJ (Malaya) (as His Lordship then was) had referred to the above passage of Lord Bingham as follows:

> Referring to the five general observations in the speech of Bingham LJ they are just that- observations arising from a review of the established cases (pp. 261-263). They were not intended to create new law. The first two observations deal with the 'assumption of responsibility test – what it means and however, it is to be applied. The third observation is in relation to the three-fold *Caparo* test and, however, this relates to a novel situation. Here the observation is imprecise labelling can make it difficult to find if a duty of care exists in a novel situation. The cautionary words in *Caparo* and the trend towards categorisation are repeated. The fourth observation is that the incremental approach is helpful when used in combination with established principle. The fifth observation is the same call made in *Ampang Jaya*'s case – that the detailed circumstances of the particular case and the particular relationship between the parties generally leads to the correct finding on the existence or not of a duty.
>
> **The fifth observation in our opinion, holds the key to this area of law. The ultimate question is whether the detailed facts and circumstances of the case support the finding of a duty of care.** The same observation is found in *Ampang Jaya*'s case and it is also found in the decision of the Court of Appeal. Merely setting out the observations as has been done in the *Barclay Bank*'s case has created no new law. It simply clarifies what the courts have been consistently saying. (Emphasis added. Paragraphs 28 and 29 at p. 557 of the reported judgment)

[45] The plaintiff's argument before us is that the learned trial judge had erred in treating the facts of the instant case as giving rise to a novel situation with the potential to extend the existing categories of negligence, rather than to consider whether the particular facts and circumstances of the instant case support a duty of care. Thus, the question before the court should be stated thus: in the particular circumstances of this case, is there a tortious duty of care owed by the defendant to the plaintiff?

[46] In response to the above, it is our considered view that whether the court is asked to extend a category of negligence (in this case to include duties of conductors of surveys like Nielsen) or to consider whether on the particular facts and circumstances of the instant case, the law can impose a duty of care, the answer to both questions would necessarily revolve on the same issues of proximity and foreseeability. Thus, in order to properly answer this question, it is imperative we understand the roles of the plaintiff *vis a vis* the defendant, the nature of the NMI surveys and the related question of the nexus (if we can call it that) of the findings/data of the NMI survey to the plaintiff. A relationship of proximity between the plaintiff and the defendant must be established in order to find a duty of care in tort.

[47] The defendant is part of a global group of companies operating under the "Nielsen" brand. They represent themselves as a global leader in media, consumer and market research. The defendant is known for its annual syndicated survey called the Nielsen Media Index or "NMI". The NMI is a wide-ranging survey that covers more than 30 different types of media, products and services. (This can be seen from the questionnaires for 2006 to 2010).

[48] The NMI survey seeks to measure amongst others, the consumption of different print and electronic media, viewership of satellite TV channels, listenership of radio channels and product and service consumption habits of the general population. The ambit of the NMI survey includes information gathered for telecommunication, credit cards, insurance, shopping, fast food and beverage consumption, dining, automotive, holidays, travel and other consumer products and services.

[49] Several pertinent points of the NMI survey are worthy of note. First, readership of newspapers and magazines (the bone of contention between the plaintiff and the defendant) is only one part of the entire survey of the consumption habits of Malaysian adult citizens in Peninsular Malaysia. Second, theSun was only one out of 23 newspapers surveyed in the NMI survey. Third, and of some importance, the NMI survey is a syndicated survey wherein the results of the survey are published on a biannual basis and only made available to paid subscribers with contractual qualifications on the data, restriction on unauthorised use and disclaimer of liabilities. As noted by the learned trial judge in para. 32 of His Lordship's judgment, non-subscribers do not have access to the results of the NMI survey and any access to such information must be by means of unauthorised sharing or disclosure of the NMI survey results. In our view, this is a pertinent factor to consider in respect of the issue of proximity between the plaintiff and the defendant.

[50] It is not disputed that the plaintiff had ceased to be a subscriber around the year 2000 (the plaintiff was a subscriber from 1995 to 2000). The period of the NMI survey that is the subject of the plaintiff's claim is for the years 2006 to 2010. From the above, it is clear that there is no contractual relationship between the plaintiff and the defendant.

[51] Can a relationship of proximity between the plaintiff and the defendant be inferred from the circumstances of the case? From a factual perspective, the results of the NMI survey was contractually intended only for the defendant's paid subscribers with contractual limitations and restrictions on its disclosure. The plaintiff, not being a subscriber had obtained unauthorised access to the results of the NMI survey in respect of the low readership of theSun. Since the plaintiff's access to such information was unauthorised, would the plaintiff be one of those who are within the contemplation of the defendant so as to be within a relationship of proximity to the defendant? We think not. To hold otherwise would open the floodgates to the imposition of a duty of care to an indeterminate number of unauthorised users, and in the words of Cardozo CJ of the Supreme Court of the United States of America, "to a liability in an indeterminate amount for an indeterminate time to an indeterminate class" (*Ultramares Corporation v. Touche* 174 NE 441, at p. 444).

[52] The plaintiff is only one of 23 newspapers surveyed and the NMI survey was not directed solely at the plaintiff. Mr Richard Hall (DW1) had explained in his evidence (Q&A 32) as follows:

> … the NMI is a national survey, which methodology is not skewed in favour of any one particular client or product and which is not intended to provide a deep analysis of any particular product or market segment. The targeting of a specified market or product would be done through customised research such as the Prime Survey and not a syndicated survey of national level readership (and other consumption) like the NMI. A feature of a national level readership and consumption survey is that the same research methodology and sample design is used across the board for all the titles (and other products and services) that form part of the survey, and that the survey occurs on an ongoing basis. This ensures that the consumption of all products within the survey is measured against the same parameters and that they are data trends.

[53] Based on the above, we are of the view that the learned trial judge did not err in his finding that on the facts and circumstances of the instant case, the defendant had not assumed responsibility towards the plaintiff in the publication of its NMI survey to its subscribers. Thus, the defendant does not owe a duty of care to the plaintiff that can give rise to a tortious liability.

[54] The plaintiffs before us also sought to discredit the data of the NMI survey which had presented low readership figures in respect of theSun newspaper, which was alleged to be inaccurate, due to the methodology and execution of the NMI survey by the defendant. In particular, the plaintiff was critical of the limitations of the methodology of face-to-face interviews, especially in respect of the affluent members who are largely inaccessible because a substantial number of them reside in high rise condominiums and gated communities. The plaintiff was also sceptical that the use of a 'booster sample' by the defendant had sufficiently addressed this issue of inaccurate and unreliable data in the NMI survey.

[55] We make the following observations in response to the above. We have found no proximity or special relationship between the plaintiff and the defendant such that the defendant must be deemed to have assumed responsibility towards the plaintiff in the publication of its NMI survey. Thus, in the absence of a legal duty owed by the defendant to the plaintiff, issues in respect of the breach of such a duty of care ie, the alleged inaccuracy of the NMI data and unreliability of its methodology and execution are not relevant. Neither are the issues of alleged economic loss to the plaintiff in its advertising revenue a relevant consideration, as both breach of a duty and consequential damage must be predicated on the finding of a duty of care.

[56] In addition, we would also echo the learned trial judge's concerns that to impose a duty of care for the publication of the data in the NMI survey to third parties would stifle research and lead to constraints on the conduct of surveys or market research by the defendant as well as other relevant parties. It cannot be disputed that such surveys are useful given their stated purpose. In any event, it is in the nature of surveys such as the NMI survey to have its own intrinsic weaknesses and limitations, given its wide ambit and its focus as a survey of lifestyle trends in Malaysia.

[57] In our considered view, on the facts and circumstances of the instant case, the plaintiff has also failed to satisfy the 'threefold tests' set out by Lord Bingham in the *Barclays Bank* case (*supra*) in that the loss to the plaintiff was not a reasonably foreseeable consequence of the defendant's action or omission; the relationship between the parties was not one of sufficient proximity and in addition, in all the circumstances of the case it is not fair, just and reasonable to impose a duty of care on the defendant towards the plaintiff.

[58] Thus, premised on the above reasons, it is our considered view that the plaintiff's cause of action against the defendant on the tort of negligence is unsustainable in law and the findings and decision of the learned trial judge on this issue is affirmed.

Defamation And Malicious Falsehood

[59] The learned trial judge found that on the evidence adduced, an action in defamation and malicious falsehood was not proven. The data in the NMI survey, which is primarily statistical and not premised on words was not found to have a defamatory meaning in itself or by innuendo. There was also no evidence of malice of Sun Media to sustain an action in malicious falsehood. We find no reason to depart from the learned trial judge's findings or application of relevant law in the above matters.

[60] For all the reasons stated above, we dismiss this appeal with costs. The order of the High Court is affirmed.